

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARSHALL BURGESS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 41358

FILED

SEP 04 2003

ORDER OF REVERSAL AND REMAND

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *Richard*  
CHIEF DEPUTY CLERK

This is an appeal from a district court order dismissing appellant Marshall Burgess's post-conviction petition for a writ of habeas corpus.

On May 24, 2001, Burgess was convicted, pursuant to a guilty plea, of one count each of robbery with the use a firearm and trafficking in a controlled substance. The district court sentenced Burgess to serve two consecutive prison terms of 48 to 156 months for the robbery count and a consecutive prison term of 35 to 156 months for the trafficking count. Burgess appealed, and this court affirmed the judgment of conviction.<sup>1</sup>

On February 11, 2002, Burgess filed a proper person post-conviction petition for a writ of habeas corpus. On March 21, 2002, the district court appointed counsel to represent Burgess, and on June 24, 2002, counsel filed a supplement to the habeas petition. On December 6, 2002, the State filed a motion to dismiss the petition, alleging it was not properly verified as required by NRS 34.730. On January 29, 2003, Burgess filed a reply to the State's motion to dismiss the petition. On March 21, 2003, the district court summarily dismissed the petition,

---

<sup>1</sup>Burgess v. State, Docket No. 38050 (Order of Affirmance, August 24, 2001).

ruling that Burgess had failed to file a properly verified petition within the one-year time period set forth in NRS 34.726. Burgess filed this timely appeal.

Burgess contends that the district court erred in dismissing his petition because the undisputed evidence presented indicates that the inmate who verified Burgess's petition was acting as Burgess's agent. Alternatively, assuming the verification was deficient, Burgess contends that a proper verification is an amendable defect and, therefore, the district court should have allowed Burgess an opportunity to cure the technical deficiency before dismissing the petition. We conclude that the district court erred in dismissing Burgess's habeas petition.

NRS 34.730(1) provides that "[a] petition must be verified by the petitioner or his counsel. If the petition is verified by counsel, he shall also verify that the petitioner personally authorized him to commence the action." An unverified habeas corpus petition is not cognizable in the district court.<sup>2</sup>

In the instant case, we conclude that the supplemental habeas petition filed by Burgess's counsel satisfied the mandatory verification requirement prescribed by NRS 34.730. The supplemental petition was filed within one year of the issuance of the remittitur in Burgess's direct appeal,<sup>3</sup> contained the signature of Burgess's attorney, and a statement

---

<sup>2</sup>See Sheriff v. Scalo, 96 Nev. 776, 616 P.2d 402 (1980); Sheriff v. Chumphol, 95 Nev. 818, 603 P.2d 690 (1979); and Sheriff v. Arvey, 93 Nev. 72, 560 P.2d 153 (1977) (construing verification requirement for pretrial habeas petition). We note that the language in NRS 34.370(1), discussing the verification requirement for a pretrial habeas petition, is identical to that contained in NRS 34.730(1).


<sup>3</sup>NRS 34.726.

from counsel sufficient to show that Burgess personally authorized his counsel to commence the action. Moreover, the supplemental petition incorporated the claims raised in Burgess's original petition by reference. Accordingly, the district court erred in summarily dismissing Burgess's petition pursuant to NRS 34.730.<sup>4</sup> The district court should have considered the claims raised in both petitions on the merits. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

  
\_\_\_\_\_, J.  
Becker

  
\_\_\_\_\_, J.  
Shearing

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Janet J. Berry, District Judge  
Nathalie Huynh  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk

---

<sup>4</sup>In light of our conclusion that the supplemental petition incorporating the claims raised in the original petition was both timely and properly verified, we need not address Burgess's arguments involving the validity of the verification of the original petition.